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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2010 AUG 31 PM 4:32
JEANNE HICKS, CLERK
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IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, **Plaintiff,** **v.** **STEVEN CARROLL DEMOCKER,** **Defendant.**	**Cause No. P1300CR20081339** **STATE'S REPLY TO DEFENDANT'S RESPONSE TO MOTION TO RECONSIDER DENIAL OF MOTION IN LIMINE TO PRECLUDE ANONYMOUS EMAIL** **The Honorable Warren Darrow**

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, submits its Reply to Defendant's Response to the State's Motion to Reconsider the Court's denial of the State's Motion in Limine to Preclude Any Reference to the Anonymous Email sent in June 2008 to Defense Counsel John Sears (herein after "the email").

FACTS AND PROCEDURAL HISTORY

The State incorporates by reference the facts as set forth in its Motion to Reconsider filed July 15, 2010.

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ARGUMENT

1. Rule 16.1, Ariz. R. Crim. P. is not applicable.

The State requested a pre-trial determination of whether or not the Court would allow the admission of any reference to the unreliable email. On June 3, 2010 Judge Lindberg declined to preclude the email pre-trial, but stated that he would consider the State's motion and argument (precluding the email). The Court stated, "I will think about it, Mr. Butner. At this point, [my ruling denying your motion in limine] stands as it is." See State's Motion at p. 4, lines 1-2; Defendant's Response at p. 2 lines 20-22. At no point did Judge Lindberg make a definitive ruling on the admissibility of the anonymous email.

A month and a half ago, on July 15, 2010, the State re-urged this Court to make a definitive ruling on whether or not the Court was actually inclined to admit the unreliable hearsay contained in the anonymous email. The State noted that it was contemplating filing for special action relief from a negative ruling. Motion to Reconsider at p. 1, FN 2. With more than three months into the trial, the matter is still not resolved.

Rule 16.1 is inapplicable in this situation. The matter has not been previously decided and the State again respectfully requests that this matter be resolved.

2. The law mandates preclusion of the email.

The *Machado* Court made numerous references to the core requirement that the proffered evidence must be reliable and abide by the underlying principles behind the Rules of Evidence. For example, in its discussion of the U.S. Supreme Court decision in *Chambers v. Mississippi* the *Machado* Court stated:

> [T]he defendant's constitutional right to present a defense trumped the state rule [of evidence] when the proffered statements had **all the circumstantial hallmarks of reliability underlying traditional exceptions to the general rule precluding hearsay**.

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Machado at ¶ 13 (referring to *Chambers v. Mississippi*, 410 U.S. 284, 300-02, 93 S.Ct. 1038, 35 L.Ed.2d 297 [1973], emphasis added). The *Machado* Court, after analyzing applicable United States and Arizona Supreme Court cases, further found:

> These cases stand for the proposition that, when assessing the admissibility of evidence proffered by an accused, the Sixth Amendment requires that courts be guided **not only** by the express terms of the pertinent **rules of evidence**, but, in applying those express terms, by the **core principles of relevance and reliability** that underlie them.

Machado at ¶ 13 (emphasis added).

There is absolutely no reference in *Machado* that the Rules of Evidence do not apply when a third-party culpability defense is asserted. Rather, the Court stated:

> Our supreme court has held the normal hearsay rules apply to third-party culpability evidence, and these rules do not violate a defendant's due process rights--as long as they are not applied mechanistically as in *Chambers* [*v. Mississippi*].

Machado at ¶ 40 (citation omitted). The main inquiries into whether or not hearsay should be admitted are the relevancy and the **reliability** of the evidence.

Hearsay that "raises nothing more than self-serving suspicion of third party involvement" is insufficient to support a third-party culpability defense. *State v. Hoskins*, 199 Ariz. 127, 144, 14 P.3d 997, 1014 (2000) (citing *State v. Fulminante*, 161 Ariz. 237, 252, 778 P.2d 602, 617 (1988)). *Machado* has not changed this core principle. The anonymous phone call in *Machado* was admitted under the hearsay exception of statement against interest. Rule 804(b)(3), Ariz. R. Evid. That is to say, the caller admitted during his phone call that **he** killed the victim.

In the case at bar, the anonymous emailer did not make any statement against his interest, but rather against unknown and unnamed third parties' interests. Defendant has

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never claimed that the email falls into any of the recognized hearsay exceptions, like the telephone call in *Machado* did. Therefore, the hearsay statement cannot be deemed reliable and may not be admitted at trial.

3. Defendant is mistaken about the law regarding third party culpability.

First, Defendant analysis mixes up the difference between what is required to admit evidence of third party culpability in the first place (*Gibson*) and what types of evidence can be used to establish that third party culpability (*Machado*). It is the second part that is the basis for the State's Motion.

Secondly, Defendant's attempts to shift the burden to the State regarding the admissibility of the anonymous email when he asserts: "The State can not disprove any part of the story from this email." Response, p. 6:22. This demonstrates his complete misunderstanding of *Machado* and why the Court should not rely upon his arguments. It is not up to the State to disprove the email's reliability. Rather, it is up to the one proffering the evidence to establish it has the indicia of reliability necessary to overcome the general rule of inadmissibility of hearsay without meeting an exception.

In this case, even when Defendant attempts to meet his burden that the email is independently corroborated, he fails to do so:

a. There is no evidence whatsoever that Mr. Knapp had any ties to an illegal prescription drug ring from Phoenix. There is no evidence that the drugs in Mr. Knapp's body were not prescribed by his treating health care providers.

b. A failed attempt to provide the email to the prosecutors does not make the email any more reliable.

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c. Defendant, his family, and presumably friends and acquaintances of the victim and Mr. Knapp knew that Mr. Knapp and the victim were friends and often spent time together at night. This is not inside information of which only someone intimate with the crime would be aware.

d. There is no evidence that there was more than one murder weapon.

e. There is no evidence that there was more than one perpetrator.

f. There is no evidence of the genders of the perpetrators.

Defendant attempts to bring the email evidence under the purview of *Machado* by arguing that it is in fact reliable because of these uncorroborated details. There is no factual support for corroboration or for this argument. Defendant's simple assertion that the email is "detailed" has no bearing on its reliability. **It is the details themselves that must be corroborated and there is none in this case.**

The few facts in the email that could (arguably) serve as corroboration were facts that could have easily been known to many others. This is not the type of corroboration anticipated by the Rules of Evidence or the *Machado* Court as this Court will note when reviewing the *Machado* analysis of the anonymous telephone confession.

It should be noted that the State had complied with numerous public records requests since January 2009, six months prior to the email date of June 19, 2009. Additionally, the State has provided voluminous disclosure to Defendant throughout this case. Innumerable persons know that the scene had been staged and that Ms. Kennedy was on the phone. In fact, commencing July 5, **2008**, there were almost daily articles in the Prescott Courier for a period of time indicating that the victim was on the phone at the time she was murdered.

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Defendant fails to cite any indicia of reliability or corroborating facts which were not known at the time the email was sent. Defendant has not met his burden of proving that the email is anything other than a complete unverified fabrication.

4. The information does not create a reasonable doubt as to Defendant's guilt.

The State objects to the introduction of the email because its probative value is substantially outweighed by the danger of unfair prejudice and would be misleading to the jury. Rule 403, Ariz. R. Evid. It is not a "plausible" alternative explanation for the murder as Defendant claims. "Plausible" is defined as "seemingly true" or "trustworthy." Webster Dictionary, Fourth Ed. 2006. It is neither.

The fact that the email attempts to deflect the attention away from both the Defendant and the murder weapon is suspect. The outlandish "theories" of some unknown and unidentifiable emailer pointing the finger at further unidentified individuals is not the type of evidence the *Machado* Court would find as corroborated, when indeed none of the theories have been corroborated by either the State or Defendant.

5. The State performed a thorough investigation into both the email and the "voice in the vent" theories advanced by Defendant.

Defendant also attempts to put the circumstances of this case in the light similar to *Machado* by arguing that the State actually investigated the matter. In *Machado,* the State sought a warrant based upon an anonymous phone call and had the ultimate effect of focusing law enforcement's efforts on the investigation of the presumed declarant. In *Machado* there was a "presumed declarant" and in this case there is not. Further, the investigation in this case was initiated at the behest of defense counsel.

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The State has a responsibility to diligently follow up on every lead that it can. This includes information learned from outside sources as well as information provided by Defendant's counsel. Defense Counsel Sears belatedly contacted the State with information regarding the anonymous email approximately two weeks after receiving it. The State began its investigation without delay.

However, the State was unable to identify the sender or corroborate any of the "facts" in the email, but not because its focus was only on Defendant and his family, as Defendant falsely asserts. Rather, Mr. Sears' delay in providing the email to the State resulted in the video surveillance tape being overwritten/destroyed that would likely have identified the anonymous emailer. Therefore, the investigation into the anonymous email "went dry" because of Defense Counsel's delay. Now, Defendant wants to hold that against the State at trial. Such a proposition is so ridiculous as to not be worthy of a response.

Defendant's attempts to point the finger at the State when his counsel is the reason for the lack of evidence is disturbing and without merit. The State should not be penalized and the jury mislead because of the action or inaction of defense counsel.

CONCLUSION

As Defendant admits, the authenticity and accuracy of the information contained in the email cannot be verified. An uncorroborated statement by an unknown individual implicating yet another unknown group of people cannot be deemed reliable. Pursuant to Rule 801(a) and (c), Ariz. R. Evid., the content of the email is hearsay. No exception to the hearsay rule allowed by Rules 803 or 804, Ariz. R. Evid. or federal constitutional rule, would allow for the admission of such unreliable hearsay evidence. For the foregoing reasons, the

State requests that this Court make a definitive ruling that Defendant is precluded from referencing the anonymous email at trial.

RESPECTFULLY SUBMITTED this 31st day of August, 2010.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: _____
Dennis M. McGrane
Deputy County Attorney

COPIES of the foregoing delivered this 31st day of August, 2010, to:

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